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Brexit, the Irish border and social security rights

Gráinne McKeever

Abstract:

This paper will examine the implications of Brexit for social security rights as they affect Northern Ireland. The paper begins with a consideration of the UK-wide implications for social security arising from Brexit including the potential impact on rights derived from EU law and the legal challenges inherent in reconciling existing EU laws with new domestic UK legislation, with concerns over the potential for parliamentary or independent scrutiny of this process. The general constitutional and political uncertainties for Northern Ireland arising from Brexit are considered in order to contextualise the examination of the most prominent social security implications for Northern Ireland – and the Republic of Ireland – stemming from the issue of cross-border working and the aggregation and exportability of social security entitlements. The paper brings together the positions of the UK, Northern Ireland, Republic of Ireland and the EU, as of January 2018, to provide a robust assessment of the cumulative issues that that will impact on social security rights in Northern Ireland post-Brexit.

Introduction

At the outset of the European Union's (EU) preparations for discussions with the United Kingdom (UK) Government about exiting the EU (Brexit) it was agreed that 'the border question' would be one of the three priorities to be resolved before full negotiations could begin.¹ This prioritised focus is on the open, seamless border that currently exists between the Republic of Ireland and Northern Ireland that enables the free movement of people, goods and services across Ireland and the UK. The open border has been the product of twenty years of continuing peace negotiations to remove the hard border that existed previously, which was heavily policed and controlled as part of the security arrangements arising from the conflict in Northern Ireland. The implications of Brexit for Northern Ireland have, understandably, focused on the need to ensure that post-Brexit border arrangements do not disturb the existing fragile political equilibrium in Northern Ireland, which itself is supported by the ability to move trade and people freely within the island of Ireland. The principle of a soft, seamless border has been the agreed preference of the UK, Northern Ireland and Irish governments, with the support of the EU, but no substantive practical solution has yet been devised, much less agreed, to implement this principle.

Much further down the Brexit planning list has been the social security implications for individuals north and south of the border in Ireland, which replicate the general UK-wide implications for social security arising from Brexit, and then layer additional complexities relating to cross-border workers and access to services. This article aims to highlight some of the detailed implications that seem likely to arise for social security arrangements in Northern Ireland and Ireland post-Brexit, an issue that has received minimal attention but which has the potential to impact significantly on social security claimants. The paper begins with a brief

¹ European Council (2017) *Guidelines following the UK's notification under Article 50 TEU*, EUCO XT 2004/17, 29 April 2017

overview of the post-Brexit implications for social security across the UK, which concern the potential impact on social security entitlement and the transposition of EU law into domestic legislation, echoing the detailed analysis by Neville Harris in this edition. It then considers the political and constitutional implications of Brexit for Northern Ireland, before examining the concerns around exporting and aggregating social security entitlements. Finally, it examines the very specific issues relating to cross-border working and accessing services between Northern Ireland and Ireland. In conclusion, it assesses the gaps remaining for social security claimants within the joint position that has been reached by all parties, reinforcing the likelihood that the obscure, technical provisions of social security entitlement, including those supported by EU law, will get overlooked or left behind post-Brexit.

EU impact on UK social security law

There are three main areas where the Brexit impact on UK social security can be anticipated: the influence of fundamental principles of EU law, the conditions under which non-UK nationals can work and claim benefits in the UK, and the legislative process to transpose EU law into domestic provisions.

Principles

UK social security law has been shaped less by detailed EU governance and more by fundamental EU principles such as free movement, equal treatment and sex discrimination.² While the EU has not driven much of the detail of social security legislation in the UK, as Harris makes clear there will still be a post-Brexit impact on social security and there are concerns about the potential loss of rights derived from EU law and the loss of future progressive change that the EU may implement.³ The implementation of EU Directive Directive 79/7 requiring the sexes to be treated equally for social security purposes, for example, has been described by Masselot et al as:

“[playing] an influential role in shaping the UK statutory social security system. It resulted in the removal of various forms of discrimination in order to ensure a progressive move towards gender equality.”⁴

Of course, future change may not be progressive and it is important to note the EU’s more regressive approach to social security in recent years under the jurisprudence of the CJEU, which Babayev argues has narrowed the social protection open to EU citizens seeking welfare support in other Member States. He charts the “emancipation of [Union] rights from their

² See D Birrell and AM Gray, “Devolution: The Social, Political and Policy Implications of Brexit for Scotland, Wales and Northern Ireland” (2017) *Journal of Social Policy* 46(4), 765-782 for a discussion of the EU’s focus on social policy more generally.

³ Neville Harris, “Welfare rights, austerity and the decision to leave the EU: influences on UK social security law” (2018, JSSL, forthcoming)

⁴ Annick Masselot, Roberta Guerrina and Bridgette McLellan, “What part did the EU play in raising women’s pensionable age?”, LSE Brexit Blog (16 June 2016) available at <http://blogs.lse.ac.uk/brexit/2016/06/16/what-part-did-the-eu-play-in-raising-womens-pensionable-age/> [accessed 13 November 2017]

economic paradigm”⁵ in *Föster* in 2008, where the court held that welfare rights derived from the status of being an EU citizen rather than from an individual’s economic activity, to more restrictive judgments, including *Dano* in 2015, which have reconsolidated the “economic paradigm” for social solidarity.⁶ This shift is further evidenced and facilitated by the EU Commission’s agreement for the UK to implement a now legally obsolete ‘emergency brake’ to restrict access to in-work benefits for four years from the point of employment⁷ – a conditional citizenship that hinged on economic contribution to the host state, and not on EU citizenship and residence in the host state, or work prospects, or family, and with a nationally imposed categorisation of universal credit (UC) as social assistance, which carries less protection than those benefits categorised as social insurance.⁸ More broadly, it is not the case that the EU’s approach to rights protection is automatically preferable. As McCrudden makes clear, “[t]raditional UK approaches to the protection of rights, through common law and Parliamentary legislation, should not always be assumed to result in less good protection of rights.”⁹ The concern, however, is that future rights protection under UK law is unlikely to cover social security claimants adequately if EU protections no longer hold,¹⁰ and that the potential contrast with progressive EU action under a pillar of social rights will become more stark.¹¹

⁵ R Babayev, “Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU” (2016) *European Journal of Social Security* 356

⁶ R Babayev, “Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU” (2016) *European Journal of Social Security* 356, 360-361

⁷ The Universal Credit (EEA Jobseekers) Amendment Regulations 2015 (SI No.546). See also the correspondence between the Social Security Advisory Committee and the Minister for Work and Pensions, Iain Duncan Smith, on these regulations: <https://www.gov.uk/government/publications/universal-credit-entitlement-of-eea-nationals>

⁸ Social assistance benefits are subject to greater restrictions than contributory benefits such as pensions, healthcare, unemployment insurance which are nationality blind and EU co-ordination of social security under Reg.883/2004 does not apply to social assistance benefits. See R Babayev, “Re-shaping the paradigm of social solidarity in the EU: on the UK’s welfare reforms and pre- and post-EU” (2016) *European Journal of Social Security* 356 and the questioning of this categorisation at 373-5.

⁹ C McCrudden, *The Good Friday Agreement, Brexit and Rights* (2017) A Royal Irish Academy and British Academy Policy Discussion Paper, p6

¹⁰ See G Phillipson and A Young, “Would use of the prerogative to denounce the ECHR ‘frustrate’ the Human Rights Act? Lessons from Miller” (2017) *Public Law* 150, analysing the concerns over the Human Rights Act post-Brexit

¹¹ European Parliament, *A European Pillar of Social Rights*, 19 January 2017, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//EN> [accessed 18 December 2017]. Future developments may also include an EU unemployment benefit system, although it seems likely that, even without Brexit, this would not have been a suitable option for the UK: G McKeever and M Simpson, ‘Worlds of welfare collide: implementing a European unemployment benefit scheme in the UK’ (2017) 19 *European Journal of Social Security* 21

Migrants

The UK's attempt to restrict social security benefits to non-UK nationals has been based largely on a view of social security benefits acting as a magnet for immigrants. This myth of magnetisation, however, has been comprehensively debunked:

“All legally employed workers may receive benefits for which they make contributions, including health care, pension rights and unemployment insurance. Nobody is proposing that legally employed intra-EU migrant workers should be cut out of these core contributory social security provisions. This leaves only the issue of non-contributory social welfare benefits, which tells us that the political debate over curtailing these benefits in order to discourage migration is a red herring.”¹²

Nevertheless the potency of this political myth persists, feeding from and into populist views on immigration and freedom of movement which are seen as central drivers for Brexit. It seems likely, therefore, that we can anticipate significant changes to the rights of non-UK nationals to move to the UK. The consequential impact will not just be on social security entitlement but on the rights of migrants to access work.¹³ This will clearly generate impacts relating to in-work benefits, including universal credit (UC) and tax credits, but more substantively it will impact on sectoral employment that relies on immigrant labour.¹⁴ This then becomes a labour market supply question, requiring decisions about domestic labour markets and domestic workers. The social security system has long since been a vehicle for managing individuals into the labour market, and this focus has been heightened under UC which adopts a new policy approach of applying conditionality to those already in work. There is currently no ready supply of home-grown labourers to replace migrant workers, raising questions over whether the social security system will play a role in moulding domestic workers into a migrant worker model through increasing conditionality for jobseekers and low-paid workers.¹⁵ If migrant workers are no longer to be recruited, then arguably there will also need to be a cut-off point at which National Insurance numbers are issued. This yet to be considered date might automatically tally with the agreement in the Joint Report that EU

¹² M Emerson, *Cameron's 'renegotiations' (or Russian roulette) with the EU: An interim assessment*, CEPS Working Document No.413 (2015), p3, available at https://www.ceps.eu/system/files/WD413%20ME%20Camerons%20renegotiations_0.pdf [accessed 13 November 2017]. See N Harris, “Demagnetisation of social security and health care for migrants to the UK” (2016) *European Journal of Social Security* 130

¹³ See for example Majella Kilkey, “Conditioning Family-life at the Intersection of Migration and Welfare: The Implications for ‘Brexit Families’” (2017) *Journal of Social Policy* 1-18

¹⁴ See for example P Taylor-Gooby, “Re-Doubling the Crises of the Welfare State: The impact of Brexit on UK welfare Politics” (2017) *Journal of Social Policy* 46(4), 815-835

¹⁵ P Taylor-Gooby points to evidence that the average hourly wage in sectors which have the highest volumes of migrant workers from the 2004 accession countries is significantly below the average hourly wage of UK-born workers, leading to his conclusion that average wages for UK workers will fall or the jobs will remain unfilled: “Re-Doubling the Crises of the Welfare State: The impact of Brexit on UK welfare Politics” (2017) *Journal of Social Policy* 46(4), 815-835

citizens can access their EU rights up until the day of the UK's withdrawal,¹⁶ but to date there has been no obvious consideration of how this will impact on the issuing of national insurance numbers, no preparations for deadline focused migrant applications for National Insurance numbers, and equally there has been no obvious planning on how to plug the migrant worker gap.

Legislation

Brexit creates a need for all government departments to consider which pieces of EU legislation impact their policy areas, and whether particular regulations should be carried over into UK law, amended or scrapped. The process of transposing EU law into domestic law will impact on all policy areas, not just social security, with the European Union (Withdrawal) Bill creating far-reaching political and constitutional concerns, but social security serves to highlight some of the more troublesome aspects relating to process, substance and compatibility.

Elliott's initial analysis of the Bill is that it is "technical, dense and complex" and he highlights concerns in particular with the scrutiny of the domestic legislation that will flow from Brexit:

"The Explanatory Notes accompanying the Bill are replete with references to "correcting" EU law as it is converted into domestic law. But to suggest ... that the Withdrawal Bill facilitates some form of technocratic exercise involving the dotting of "i"s and the crossing of "t"s so as to ensure that the statute book is tidied up in time for exit day lacks any basis in reality ... What needs to be done between now and exit day is nothing short of a Herculean task ... The delegated powers granted by the Bill are as extraordinarily vague as they are broad; the arrangements for parliamentary oversight are ... inadequate ..."¹⁷

As the Bill has progressed through its parliamentary stages, none of these concerns have abated. The stated purposed of the EU (Withdrawal) Bill is to replicate the EU and EU-related law on 'exit day' turning this into a body of domestic law known as retained EU law. Even where existing provisions are replicated, however, there is a question over how confident we can be that once transposed into UK law, the rules will not subsequently be abandoned: the EU (Withdrawal) Bill provides a mechanism whereby the UK can quietly repeal, or amend, these EU laws, one by one, without proper scrutiny. The switch to delegated power intended under clause 7(1) of the Bill provides Ministers with the power to pass regulations to prevent, remedy or mitigate 'deficiencies' in retained EU law or deal with its failure to operate

¹⁶ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*. The Joint Report provides that UK and EU citizens will be able to exercise their EU rights in until the time of the UK's withdrawal from the EU: para. 8

¹⁷ Mark Elliott, "The EU (Withdrawal) Bill: Initial Thoughts", Public Law for Everyone blog (14 July 2017) available at <https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/> [accessed 13 November 2017]

‘effectively’, without any attempt to define efficiencies or deficiencies.¹⁸ Changes will be done by Ministerial orders, which cannot be amended, and are rarely even debated, adding to Lord Judge’s lament that:

“by the time the Brexit process has finished its Parliamentary journey, we shall have irremediably cemented lawmaking by un-scrutinised legislation into our constitutional arrangements.”¹⁹

The conclusion of the Hansard Society is that “[c]onstitutional principles about the relationship between the executive and the legislature are at stake” and that there is a need for proper parliamentary scrutiny to redress this balance.²⁰ Despite this concern, a Labour amendment calling for a scrutiny committee to consider secondary legislation passed under the bill was defeated by 311 votes to 292.²¹ The government’s concession to avoid losing the vote was to agree to create a new committee of MPs to ‘sift’ secondary legislation by determining when an affirmative, rather than negative resolution procedure would be required. It is difficult to describe this as scrutiny, since all it can deliver is delay rather than amendment, which does little to allay concerns about Ministerial overreach.

While the worrying prospect remains that the EU (Withdrawal) Bill paves the way for “constitutional vandalism” as a means of removing swathes of EU law,²² for social security a more prosaic concern arises. As Harris notes, the likely changes to social security will be “highly technical (not least where effecting transitional arrangements) and elusively obscure, hidden within Brexit’s murkiest waters”.²³ Even minor changes in social security regulations produce ripple effects into what are already murky waters, that will be further muddled by the inclusion of Brexit mandated changes. The unintended consequence of transposing already sizeable chunks of legislation may well be that such “elusively obscure” provisions

¹⁸ See House of Commons Library, *Briefing Paper Number 8171, The European Union (Withdrawal) Bill: clause 7 “the correcting power”*, 6 December 2017

¹⁹ The Right Hon Lord Judge PC, “A Judge’s View on the Rule of Law” (2017) Annual Bingham Lecture, available at https://www.biicl.org/documents/1637_2017_05_11transcript_of_lord_judges_speech_3.pdf?showdocument=1 [accessed 13 November 2017]

²⁰ R Fox, J Blackwell and B Fowler, *Taking Back Control for Brexit and Beyond: Delegated legislation, Parliamentary scrutiny and the European Union (Withdrawal) Bill*, 2017 Hansard Society. See also Hansard Society, *European Union (Withdrawal) Bill: Briefing for days 6 and 7, House of Commons Committee Stage debate*, December 2017, available at https://assets.contentful.com/xkbase0jm9pp/3LeMZtWXuKuglAcAkESWG/343a1b1e0376ca6420b9384cf8faf722/EU_W_B_Briefing_FINAL.pdf [accessed 18 December 2017]

²¹ To date (January 2018) the only defeat the government has suffered on the Bill has been on clause 9, by an amendment tabled by Dominic Grieve MP, which leaves Brexit subject to the prior enactment of a statute by parliament approving the final terms of withdrawal of the United Kingdom from the European Union

²² C Harvey, *A Time of Crisis and Challenge: Brexit and our Constitutional Future*, QPol blog, 22 November 2017, available at <http://qpol.qub.ac.uk/crisis-challenge-brexit-ni-constitutional-future/> [accessed 18 December 2017]

²³ N Harris, “Editorial” (2016) 23 *Journal of Social Security Law*, 113, at 115.

that happen downstream will be overlooked to the potential detriment of claimants who are directly affected.²⁴

In addition to the standard lack of scrutiny jeopardising the protection of existing rights, there remains a question over whether the replication of complex social security provisions can compete with shifting national and devolved policy agendas.²⁵ The government's White Paper on Brexit anticipates a greater role for Parliamentary select committees in scrutinising the legislation flowing from the Withdrawal Bill,²⁶ but makes no mention of the Social Security Advisory Committee, a statutory, non-departmental public body that currently reviews draft social security legislation and which exists, in part, because of the already highly complex and technical nature of social security provisions which require independent scrutiny.²⁷ Given the pressure that Parliament and its committees will face in discharging the "Herculean task" of scrutiny, the SSAC exists as a model for enhanced scrutiny which it would seem sensible for the government to utilise.²⁸ The need for enhanced scrutiny has been confirmed by the House

²⁴ See for example the technical amendment to the Child Benefit (General) Regulations 2006 through the Child Benefit (General) (Amendment) Regulations 2017. This impacted on entitlement to Child Benefit in Northern Ireland for a qualifying young person in "approved training". The list of approved training is provided under regulation 1(3) of the Child Benefit (General) Regulations 2006, which required to be amended to include a new approved training scheme in Northern Ireland, funded through the EU PEACE IV Children and Young People 2.1 initiative. The uncontroversial and technical amendment to the definition of "approved training" also had an unforeseen impact on the interaction of the £8 a day incentive payment for attendance and the earnings disregard in a young person's claim for UC or JSA, which had to be addressed. The removal of the incentive payment would have had a significant impact on those young people affected by the change, but it was such a far-removed and obscure consequence that it had not been identified by the legislative drafters of the original technical amendment.

²⁵ See The Right Hon Lord Judge PC, "A Judge's View on the Rule of Law" (2017) Annual Bingham Lecture, available at https://www.biicl.org/documents/1637_2017_05_11transcript_of_lord_judges_speech_3.pdf?showdocument=1 [accessed 13 November 2017], in which Lord Judge states: The last time the Commons rejected a statutory instrument was in 1979, over 35 years ago. At least the Lords has rejected 6 such instruments since 1968, that is, in almost 50 years."

²⁶ HM Government, The United Kingdom's exit from and new partnership with the European Union (Cm 9417, 2017) para.1.9. See also J Tomlinson, *The Individual in the Reformation of the UK's Bureaucratic State—Administrative Justice, Brexit, and Human Rights*, (March 12, 2017), available at <https://ssrn.com/abstract=2933880>

²⁷ G McKeever, "Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution" (2016) *Journal of Social Security Law* 126

²⁸ See Social Security Advisory Committee, *Is there a role for bodies similar to the Social Security Advisory Committee (SSAC)?* (2017) available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/procedure-committee/exiting-the-european-union-scrutiny-of-delegated-legislation/written/70712.html> [accessed 11 November 2017] submitted as evidence to the

of Commons Procedure Committee in light of the “unique and unprecedented” task facing the House of Commons in the process of transposing EU law into domestic legislation,²⁹ but the Parliamentary rejection of a scrutiny amendment means that there is unlikely to be adequate alignment of transposed EU law with existing social security legislation, creating further potential for uncertainty or retrogression in the protection of social security rights.³⁰

Northern Ireland: constitutional and political context

To state the obvious but critical point, Northern Ireland is the only part of the UK that shares a land border with another EU country. As well as the significance of this physical landscape, a history of conflict and poverty are writ large on Northern Ireland’s political and economic landscape. The EU referendum in Northern Ireland resulted in a majority remain vote, with 56 per cent of the population voting to remain in the EU and, within this overall majority, an average of 64 per cent of those living in the border counties voting to remain (Fig.1).³¹

House of Commons Procedure Committee’s Inquiry on *Exiting the European Union: scrutiny of delegated legislation* (2017)

²⁹ House of Commons Procedure Committee, *Scrutiny of delegated legislation under the European Union (Withdrawal) Bill: interim report*, First Report of 2017-19 (2017) HC 386, available at:

<https://publications.parliament.uk/pa/cm201719/cmselect/cmproced/386/386.pdf>

[accessed 11 November 2017]

³⁰ See C McCrudden, *The Good Friday Agreement, Brexit and Rights* (2017, British Academy and the Royal Irish Academy) pp5-6.

³¹ The voting division in Northern Ireland is also reflective of divisions in identity in Northern Ireland, with those identifying as British/Unionist/Protestant more likely to have voted to leave the EU, while those identifying as Irish/Nationalist/Catholic more likely to have voted to remain: see Lords EU Committee, *Brexit: Devolution*, para. 39 and J Gary, *The EU referendum Vote in Northern Ireland: Implications for our understanding of citizens’ political views and behaviour* (2016) Knowledge Exchange Seminar Series, Northern Ireland Assembly, http://www.niassembly.gov.uk/globalassets/documents/raise/knowledge_exchange/briefing_papers/series6/garry121016.pdf

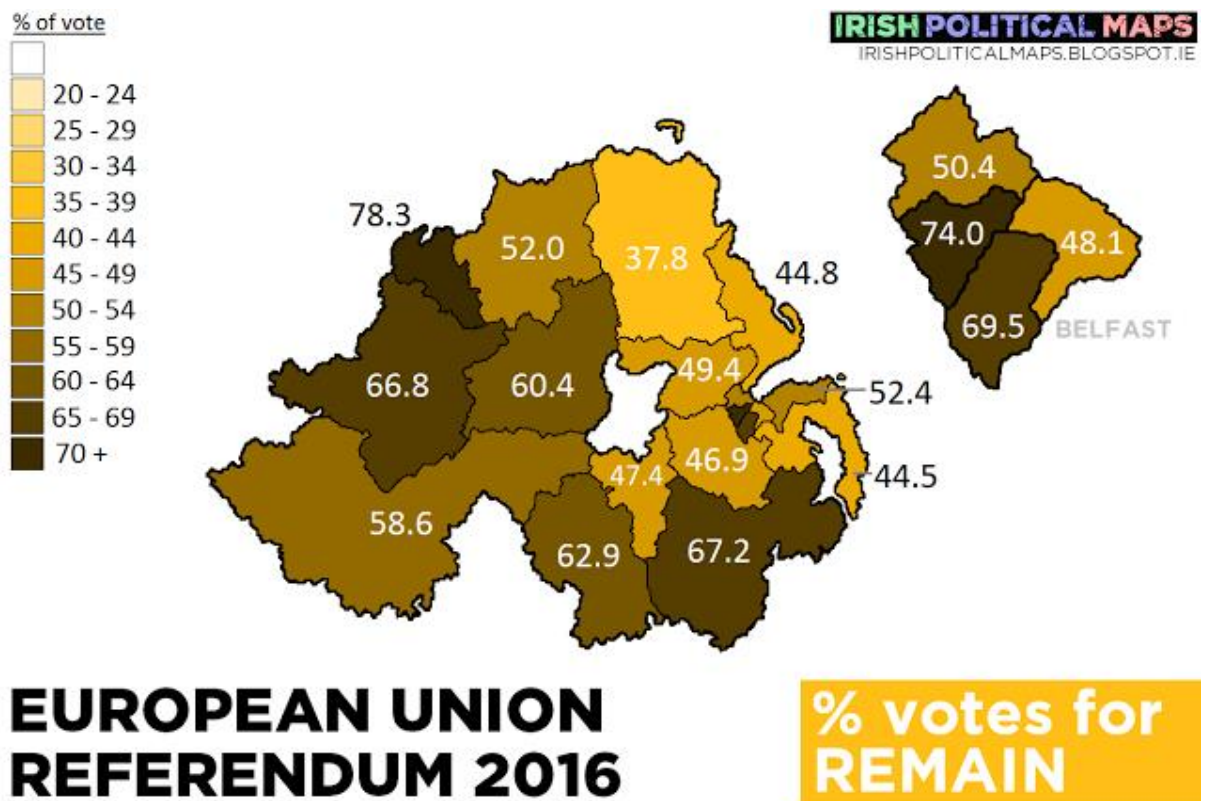


Figure 1: Breakdown of the 'remain' vote in the EU referendum in Northern Ireland (source: Irish Political Maps)³²

It also remains obvious that Northern Ireland is a post-conflict society with a fragile peace settlement which continues to be plagued by political crises. The 1998 Belfast (Good Friday) Agreement (GFA) provides a complex, nuanced framework for Northern Ireland's constitutional and political structures as well as inter-party and inter-governmental relationships: within Northern Ireland, between Northern Ireland and the Republic, between the island of Ireland and Great Britain, as well as between the Irish and UK Governments.³³ The issue of citizens' rights and identity was part of this new constitutional settlement. As McCrudden states, the GFA "was much more than a rights-driven document", but nonetheless rights remain a central construct in each aspect of the Agreement, and although "the EU was never conceived as the sole guarantor of rights in Northern Ireland, rights deriving from the EU are, nevertheless, an important dimension of the post-GFA architecture."³⁴ Moreover, the Agreement was based on a shared assumption that the UK

³² Irish Political Maps, *European Union Referendum 2016: Northern Ireland*, available at: <http://irishpoliticalmaps.blogspot.co.uk/2016/06/european-union-referendum-2016-northern.html> [accessed 14 November 2017]

³³ Northern Ireland Office, *The Belfast Agreement* (1998), available at: <https://www.gov.uk/government/publications/the-belfast-agreement> [accessed 14 November 2017]

³⁴ C McCrudden, *The Good Friday Agreement, Brexit and Rights* (2017, British Academy and the Royal Irish Academy), pp3-4. See also A Morgan, *The Belfast Agreement: A practical legal analysis* (2000, Belfast: The Belfast Press) for a detailed account of the constitutional history and impact of the GFA, and its context in public international and European law.

and Ireland would remain within the EU, with this shared EU citizenship helping to diffuse more contentious concepts of national identity in Northern Ireland. EU law is interwoven within Northern Ireland's intricate political and legal systems, creating an additional layer of relationships between Northern Ireland, Ireland, Britain and the EU,³⁵ and there has been heavy investment by the EU in Northern Ireland's peace process, a point recognized by the House of Lords EU Committee which emphasized the positive role played by the EU in establishing and maintaining peace in Northern Ireland.³⁶ The consequent risk that Brexit poses to this intricate arrangement is explained by Dougan:

"The ultimate concern is that the cumulative effects of economic uncertainty and instability, fundamental changes to the longstanding constitutional framework which has underpinned the peace process, and the potential for one or both of the main communities to feel that important aspects of their identity are under pressure, will render even more difficult the task of securing political stability and promoting social cohesion."³⁷

The constitutional and political implications of Brexit, therefore, create another obstacle for Northern Ireland's fragile and often dysfunctional governance systems to overcome.

One of the possibilities that has been mooted to help overcome this obstacle has been to allocate 'special status' to Northern Ireland within the EU, recognising its unique geographical, economic and political circumstances and enabling the continued movement of people, goods and services across the border, including protecting access to EU rights pertaining to employment, social security and healthcare.³⁸ The examination of cross border

³⁵ House of Lords European Union Committee, *Brexit: Devolution*, Fourth Report of 2017-19 (2017) HL No.9, pp 9-10

³⁶ The Committee identified four ways in which the EU had contributed to the peace process: "the safeguards that EU membership provides in underpinning the Belfast/Good Friday Agreement; the role that common UK-Irish EU membership played and continues to play in transforming relations between the two countries; the effect of common EU membership in diluting cross- community tensions in Northern Ireland; and the positive impact of EU funding in Northern Ireland." House of Lords European Union Committee, *Brexit: UK-Irish Relations*, Sixth Report of 2016-17 (2016) HL No.76, para.159. C Gallagher and K O'Byrne note that Northern Ireland is more dependent on EU funding than any other region of the UK, amounting to over €7bn in funding for European programmes, including towards the peace process, from 2007-2020: *Report on how Designated Special Status for Northern Ireland within the EU can be delivered*, Doughty Street Chambers, October 2017, para.3.35, available at http://www.guengl.eu/uploads/publications-documents/NI_Special_status_report_161017_FINAL_crops.pdf

³⁷ M Dougan, "The Northern Irish Border", in M Dougan (ed.) *The UK after Brexit: Legal and Policy Challenges* (2017, Cambridge: Intersentia) p54

³⁸ Dáithí Ó Ceallaigh, *Brexit: a status report* (2017) Institute of International & European Affairs, available at http://www.iiea.com/ftp/Publications/2017/StatusReport_V19.pdf [accessed 14 November 2017]. See also the recommendation of the Irish Committee on the Implementation of the Good Friday Agreement that the Irish government should negotiate for Northern Ireland to be designated with special status within the EU and for the whole

Brexit issues by the Irish Joint Committee on Jobs, Enterprise and Innovation, for example, has recommended 'special status' specifically to protect social security rights.³⁹ While Harvey points out that Northern Ireland already holds a unique constitutional position as a result of the GFA,⁴⁰ any extension of this uniqueness to deal with Brexit has been rejected by unionists in Northern Ireland who object to marking Northern Ireland out as different from the other parts of the UK. At the same time that 'special status' for Northern Ireland has been rejected by unionists, there has also been a growing narrative on a 'border poll' on the unification of Ireland. Both the poll and reunification itself remain unlikely prospects at present but these are now proposals that have considerably more credibility than was the case prior to the outcome of the referendum.⁴¹ The voting patterns in the Brexit referendum were partially split along ethno-national lines: 85% of those who identified as 'Catholics' voted 'Remain' compared to 40% of those who identified as 'Protestant',⁴² supporting Tonge's conclusion that "the binary divide is being reinforced ... by Brexit."⁴³

Any reinforcement of a binary divide returns us to Dougan's concerns on the ability to maintain political stability but it also potentially underlines a mirror-image party-political divide on social security which has the proven ability to destabilise the Northern Ireland institutions, as the history of the Welfare Reform (Northern Ireland) Order 2015 makes clear.⁴⁴ Social security is fully devolved to Northern Ireland but has traditionally replicated

island of Ireland to have a unique solution as part of the Brexit negotiation: *Brexit and the future of Ireland: Uniting Ireland & its people in peace & prosperity*, August 2017, <https://senatormarkdaly.files.wordpress.com/2017/04/section-1-pdf.pdf>

³⁹ Irish Joint Committee on Jobs, Enterprise and Innovation, *The Likely Economic Impact of Brexit with Particular Emphasis on Jobs and Enterprise* (March 2017) 32 JEI 004, at <http://www.oireachtas.ie/parliament/media/committees/jobsenderpriseandinnovation/32ndreports/Brexit-and-its-impact-on-jobs-and-enterprise.pdf>

⁴⁰ C Harvey, *A Time of Crisis and Challenge: Brexit and our Constitutional Future*, QPol Blog (22 November 2017) available at <http://qppl.qub.ac.uk/crisis-challenge-brexit-ni-constitutional-future/> [accessed 23 November 2017]

⁴¹ A border poll is likely to be resisted strongly by Northern Ireland's unionist politicians, and given the Conservative government's dependence on support by MPs from the Democratic Unionist Party and the requirement under the Northern Ireland Act 1998 that a poll can only be called by the Northern Ireland Secretary, it remains an improbable move for the immediate future. However, unionist objections to a border poll might also provide political leverage for the UK government in the extreme, to enable special arrangements to apply to Northern Ireland: "For the UK government, the biggest incentive to offer such a solution to Scotland and Northern Ireland would be that it represents a tangible alternative to secession." – N Scutaris, "Territorial Differentiation in EU Law: Can Scotland and Northern Ireland Remain in the EU and/or the Single Market?" (2017) *Cambridge Yearbook of European Legal Studies*, 19, 287, at 309

⁴² Brexit Law NI, *Preliminary Findings Report: Brexit and the Peace Process* (2017) available at: <https://brexitlawni.org/assets/uploads/BrexitLawNI-Preliminary-Findings-Report-Peace-Process.pdf> [accessed 11 November 2017]

⁴³ House of Lords European Union Committee, *Brexit: Devolution*, Fourth Report of 2017-19 (2017) HL No.9, para. 39

⁴⁴ SI 2006/01

British social security legislation: the history of social security in Northern Ireland has been premised from the outset on the (unionist) political imperative to treat Northern Ireland the same as the rest of the UK, regardless of the substantially different economic circumstances in Northern Ireland that the social security system has had to respond to.⁴⁵ While the current economic reality makes substantive social security divergence unlikely, it was the political differences between the main unionist and republican parties in the Northern Ireland Executive that were played out through the 2015 Order where the choice was between a unionist preference for parity with the equivalent legislation in Britain and the republican preference for bespoke social security reform specific to Northern Ireland. The compromise position – replication with time limited mitigations – was at least possible due to a functioning Northern Ireland Executive and Assembly, with British and Irish government support. The current absence of these power-sharing institutions make compromises across the binary divide more difficult to achieve, even on the non-sectarian issue of social security.⁴⁶

This binary divide may become further pronounced with the UK government's 'confidence and supply' arrangement with Northern Ireland's largest unionist party, the Democratic Unionist Party (DUP). As Harvey explains, there is:

"a distinctive logic to [Northern Ireland's] political constitutionalism that follows power-sharing principles, all the way up and down. It is not apparent that Whitehall and Westminster get this; the current arrangement with the DUP probably does not assist."⁴⁷

While a confidence and supply arrangement is not an unusual form of establishing a parliamentary majority, it weighs alongside the current imbalance of political voices from Northern Ireland within the UK Parliament that further reinforces the binary, ethno-national divide. This imbalance of political perspective is exacerbated by the absence of any nationalist politicians at Westminster as a result of the decision of Sinn Féin MPs not to take their seats in the UK Parliament.⁴⁸ The EU Committee has already issued a warning that Northern

⁴⁵ G McKeever, "Legislative Scrutiny, Co-ordination and the Social Security Advisory Committee: from system coherence to Scottish devolution" (2016) *Journal of Social Security Law* 126, 136-138; M Simpson, "Developing constitutional principles through firefighting" (2015) *Journal of Social Security Law* 31. There are echoes here, too, of the objections of unionist politicians in Northern Ireland post-World War two, where immigration checks existed for those travelling between Northern Ireland and Britain, a problem defined by the British government as being of the Irish government's making, in the latter's refusal to adopt similar immigration policies to Britain: B Ryan, "The Common Travel Area between Britain and Ireland" (2001) *Modern Law Review* 855, 858

⁴⁶ See AM Gray and D Birrell, "Coalition Government in Northern Ireland: Social Policy and the Lowest Common Denominator Thesis" (2012) 11 *Social Policy and Society* 15

⁴⁷ Colin Harvey, *Judging Brexit solutions* (2017) available at <https://brexitlawni.org/blog/judging-brexit-solutions/> [accessed 13 November 2017]

⁴⁸ The largest nationalist party in Northern Ireland, Sinn Féin, won 7 seats in the 2017 General Election but the party's long-standing policy is that it will not take its seats in the UK parliament. The nationalist Social Democratic and Labour Party, which did traditionally take

Ireland's fragile, cross-community peace settlement should not become "collateral damage" of Brexit,⁴⁹ reinforcing Harvey's concern that the principle of power-sharing arrangements is at risk.

The ability of the devolved administrations in the UK to influence the UK government's decisions on Brexit is limited. Despite arguments that "the Westminster Parliament has endorsed and created a constitutionally pluralist UK, with genuine legal as well as political bite",⁵⁰ the Supreme Court's decision in *Miller* found that there was no legal right for devolved assemblies to be consulted over triggering Article 50 TEU, with the Sewel Convention being read as a political rather than legal convention.⁵¹ More specifically, *Miller* held that there was nothing in the Good Friday Agreement to require consultation with the Northern Ireland Assembly before beginning the process of withdrawal from the EU, although the constitutional right for Northern Ireland citizens to hold Irish (EU) citizenship flows from the Agreement. To have answered the constitutional question otherwise would, perhaps, have brought its own problems, but it is fair to say that there is not universal acceptance among constitutional lawyers that the court made the right decision.⁵²

The absence of legal solutions to require engagement with devolved government voices mirrors the absence of substantive political engagement with devolved government concerns. The UK government has adopted "a 'whole UK approach which affords the devolved nations little constitutional protection of their interests, or accommodation of their demands.'"⁵³ The House of Lords EU Committee welcomed the creation of a Joint Ministerial Committee (European Negotiations) to engender a more diverse perspective but concluded that the government needed to "raise its game" to make the JMC (EU) more effective, having taken evidence that the Committee functioned more as a venue for managing disagreements rather than engaging with issues and finding solutions.⁵⁴ There is no devolved representation in the Cabinet committee dealing with the EU exit (DEXEU); the Secretary of State for Northern Ireland can attend as required, at the government's invitation. Northern Ireland itself has done little to no planning for Brexit – no departmental or Executive papers were issued before the referendum, although a paper by the European Policy and Co-ordination

its seats at Westminster, did not win any in the 2017 General Election, and nor did the cross-community Alliance party. Northern Ireland also currently has one Independent Unionist MP.

⁴⁹ House of Lords European Union Committee, *Brexit: Devolution*, Fourth Report of 2017-19 (2017) HL No.9, para. 95; see also House of Lords European Union Committee, *Brexit: UK-Irish Relations*, Sixth Report of 2016-17 (2016) HL No.76 which reached the same conclusion

⁵⁰ C Harvey, "Has Nothing Really Changed Here? Brief Reflections on the 'Brexit Litigation'" RightsNI Blog (2 December 2016) available at <http://rightsni.org/2016/12/has-nothing-really-changed-here-brief-reflections-on-the-brexit-litigation/> [accessed 14 November 2017]

⁵¹ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5

⁵² Paul Craig, "Miller: Structural constitutional review and the limits of prerogative power" (2017) *Public Law* 48

⁵³ J Hunt, "Devolution", in M Dougan (ed.) *The UK after Brexit: Legal and Policy Challenges* (2017, Cambridge: Intersentia) p38

⁵⁴ House of Lords European Union Committee, *Brexit: Devolution*, Fourth Report of 2017-19 (2017) HL No.9, para. 292-293

Unit within the Office of First Minister and Deputy First Minister analysing the potential impact of Brexit for the UK and Northern Ireland was completed in May 2015, but not released until after the referendum.⁵⁵ In August 2016, a joint letter by the former First and Deputy First Ministers was sent to the Prime Minister, Theresa May MP, outlining areas of concern for Northern Ireland flowing from Brexit.⁵⁶ By the time the Northern Ireland Assembly had collapsed six months later, no further Brexit plans had been laid. Unsurprisingly, therefore, post-Brexit social security concerns have not featured prominently in any of the limited discussions to date, despite being a fully devolved policy area for Northern Ireland.⁵⁷

Perhaps the silver lining here is that the concerns around the refusal of the UK government to automatically repatriate EU powers to devolved assemblies is less likely to impact on social security provision than other areas, such as environmental law.⁵⁸ This creates some scope for bespoke bilateral social security arrangements between Northern Ireland and other states even though the EU powers that will pass back to Westminster post-Brexit will be in relation to the co-ordination of social security entitlements across the EU and the rights of migrants to access benefits, both of which are areas over which devolved administrations currently hold little power. For Northern Ireland, however, the silver lining comes in a dark cloud that is the continued absence of a functioning executive and legislative assembly.

The Republic of Ireland dimension

The current arrangements affecting people, goods and services travelling between the Republic of Ireland, Northern Ireland and Britain predate Ireland and the UK joining the EU.⁵⁹ The Common Travel Area (CTA) was the product of pragmatic arrangements between Ireland and the UK following the partition of Ireland and the creation of the Irish Free State in 1922 to facilitate Britain's need to recruit Irish labour after the second world war, the difficulty of controlling the Irish/Northern Irish land border, and the inconvenience that border controls would create for the inhabitants of Northern Ireland.⁶⁰ It operated as an administrative

⁵⁵ European Policy and Co-ordination Unit, *Preliminary analysis of the impact of a UK Referendum on its membership of the European Union* (2015) available at: <https://thedetail-website.s3.amazonaws.com/asset/upload/2098/here.pdf> [accessed 14 December 2017]

⁵⁶ *Letter to the Prime Minister, the Rt Hon Theresa May MP from the First Minister and deputy First Minister of the Northern Ireland Executive*, (10 August 2016), available at: <https://www.executiveoffice-ni.gov.uk/sites/default/files/publications/execoffice/Letter%20to%20PM%20from%20FM%20%26%20dFM.pdf> [accessed 14 November 2017]

⁵⁷ It should be noted that immigration is a reserved matter and that Northern Ireland is not likely to see an increase in devolved powers to deal with social security/immigration overlaps.

⁵⁸ The powers currently held by the EU will be returned to Westminster in the first instance. UK government Ministers will then determine on a case by case basis whether these powers will be released to devolved administrations, using Orders in Council.

⁵⁹ Mary E. Daly, *Brexit and the Irish Border: Historical context* (2017) A Royal Irish Academy and British Academy Policy Discussion Paper

⁶⁰ B Ryan, "The Common Travel area between Britain and Ireland" (2001) 64 *Modern Law Review* 855, 860

agreement, premised on Irish citizens not being treated as ‘aliens’ in the UK, and Ireland continuing to implement the same immigration policies and controls as the UK.⁶¹ The reciprocal status of British and Irish citizens in each other’s jurisdictions are still governed by equivalent exceptions to border control reflecting the need to be able to facilitate the movement of goods, services and people, the political sensitivities of enforcing border controls, and the physical difficulty of immigration control on the 300 mile long Irish border which does not follow natural boundaries and has over 270 land border crossings.⁶² This agreement between Ireland and the UK has been recognised by Protocol 20 annexed to the Treaty of Lisbon, and EU membership by Ireland and the UK has been instrumental in easing the flow of goods and people across the Irish border:

“British and Irish membership of the EEC/EU has been a very significant force in improving cross-border infrastructure and providing a legal framework for the free movement of goods, services and people. The Single European Market of 1993 and the removal of security checks following the Good Friday Agreement combined to make the border invisible.”⁶³

The reality to date has been that UK and Ireland have treated each others citizens more favourably than is required under EU law, and will wish to continue to do so post-Brexit. The EU’s support for this position is now also clear, following the recognition in the December 2017 Joint Agreement that the UK and Ireland can maintain the arrangements supporting the CTA post-Brexit.⁶⁴

The Irish government’s approach to Brexit, and its implications for Ireland north and south, has involved a more robust response to the border problems than has been the case by either the (former) Northern Ireland administration or the UK government. Most notably, Ireland has secured agreement with the EU that Northern Ireland can automatically rejoin the EU in the event of Irish reunification.⁶⁵ Focusing on protecting access to EU rights pertaining to employment, social security and healthcare, the Irish government has made clear that:

“The UK remaining in the EEA, EFTA, or the Customs Union would be a best case scenario for Ireland (apart from the UK remaining a member of the EU) as it would

⁶¹ B Ryan, “The Common Travel area between Britain and Ireland” (2001) 64 *Modern Law Review* 855

⁶² See the interactive map at <http://www.borderroadmemories.com> [accessed 18 December 2017]. During the years of ‘the Troubles’ in Northern Ireland, only 20 land borders were allowed to remain open.

⁶³ Mary E. Daly, *Brexit and the Irish Border: Historical context* (2017) A Royal Irish Academy and British Academy Policy Discussion Paper, pp5-6

⁶⁴ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, para. 54

⁶⁵ European Council, *Minutes of Special meeting of the European Council (Art.50) held on 29 April 2017* (23 June 2017), available at <http://data.consilium.europa.eu/doc/document/XT-20010-2017-INIT/en/pdf> [accessed 10 November 2017]

represent the closest possible relationship to the current arrangement. This model would also have the least impact on the border with Northern Ireland ...”⁶⁶

A Seanad Special Committee on the Withdrawal of the United Kingdom from the European Union, established to consider the implications for Ireland of Brexit, takes the view that:

“the negatives far outweigh the positives when it comes to the impact of Brexit on Ireland. Our report reflects this and is based on the overwhelming evidence offered by our witnesses.”⁶⁷

It seems fair to say that Brexit is seen as an act of aggression and hostility by many Irish politicians and commentators. Former Taoiseach John Bruton told the Seanad Committee in April 2017, that “[t]he terms for Brexit, as set out so far by Mrs May, will do incalculable damage to this island, politically, emotionally and economically.”⁶⁸ Commentator Noel Wheelan asserts that “[t]riggering the Brexit process is the most harmful act perpetrated by a British government on Ireland ... in 95 years”,⁶⁹ while Fintan O’Toole observes that “there’s ... a very particular kind of anger in Ireland because the effects on us are so profound.”⁷⁰ It seems equally fair to say that these perspectives have not been very visible in the Anglo-centric analysis on how Ireland will respond to Brexit. Indeed, the ‘Irish question’ generated surprise and contempt in the UK’s popular presses when the potential for this issue to derail the UK’s progress on Brexit became headline news.⁷¹ The political realities mean that the Irish government will wish to avoid further damage to the UK-Irish relationship, and the Irish

⁶⁶ Joint Committee on Jobs, Enterprise and Innovation, *The Likely Economic Impact of Brexit with Particular Emphasis on Jobs and Enterprise* (2017) 32 JEI 004, p.20, available at <http://www.oireachtas.ie/parliament/media/committees/jobsenderpriseandinnovation/32ndreports/Brexit-and-its-impact-on-jobs-and-enterprise.pdf> [accessed 10 November 2017]

⁶⁷ Press release on Seanad Select Committee report, Committee Chair, Senator Neale Richmond, “Report is the result of a request from EU Chief Negotiator Michel Barnier for potential solutions” (4 July 2017), available at <http://beta.oireachtas.ie/en/press-centre/press-releases/20170704-special-seanad-committee-launches-its-report-on-brexit-1/> [accessed 10 November 2017]. See Seanad Special Select Committee Withdrawal of the United Kingdom from the European Union, *Brexit: Implications and Potential Solutions* (2017) 32/SSSCWUKEU/01

⁶⁸ Testimony by John Bruton, at the Seanad Special Select Committee on the UK’s Withdrawal from the European Union, 27 April 2017, <http://www.oireachtas.ie/parliament/media/committees/seanadspecialselectctteeonbrexit/John-Bruton-SEANAD-TESTIMONYrevised.pdf> [accessed 14 November 2017]

⁶⁹ Noel Wheelan, “Anger over Brexit may be justified but it is not a policy”, *The Irish Times* 31/03/17

⁷⁰ Fintan O’Toole, “O’Toole named European Commentator of the Year”, *The Irish Times*, 21 April 2017

⁷¹ Editorial, “Ireland’s naive young prime minister should shut his gob on Brexit and grow up”, *The Sun*, 18 November 2017; T Sculthorpe, “Irish ministers warn they are 'resolute' about blocking Brexit deal as standoff over Northern Ireland border deepens despite EU negotiator Barnier warning the 'moment of truth' is nearing”, *The Daily Mail*, 28 November 2017

Taoiseach and Foreign Minister have continued to state that they will work with the UK government to achieve the best possible outcome for Ireland, north and south. Regardless of this, however, Ireland is only one of 27 EU member states which will make final determinations on how Brexit impacts Northern Ireland and so even with Ireland's co-operation on critical issues like the the movement of goods, services and people across the island of Ireland, "[i]t is not a given that the EU will tolerate uncontrolled movement from the UK into the EU, via the UK-Irish border."⁷²

Open Europe has suggested that the border itself is a "red herring", since the reality of immigration control will focus not on border controls but on mechanisms that control access to social security benefits and employment which limit the possibility of individuals 'over-staying',⁷³ a point picked up in the UK government's position paper on Ireland and Northern Ireland.⁷⁴ It seems naïve to imagine the border will not continue to be a prominent feature of immigration control but there is truth in the observation that other forms of control will impact directly on individual rights to access services (including social security) or secure employment, particularly on a cross-border basis, and will be where the lived reality of the post-Brexit world takes place.

The border: Cross-border working & social security entitlements

There are an estimated 23,000-30,000 cross border workers: those who live in one part of Ireland and work in the other.⁷⁵ This includes UK nationals as well as non-UK and Irish

⁷² House of Lords European Union Committee, *Brexit: UK-Irish Relations*, Sixth Report of 2016-17 (2016) HL No.76, para.131

⁷³ House of Commons Library, *The Common Travel Area, and the special status of Irish nationals in UK law*, Briefing Paper No.7661 (2017) p 18

⁷⁴ HM Government, *Northern Ireland and Ireland: position paper*, (2017), para.33, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638135/6.3703_DEXEU_Northern_Ireland_and_Ireland_INTERACTIVE.pdf [accessed 14 November 2017]

⁷⁵ Centre for Cross Border Studies, EU Reference Briefing Paper 4, <http://crossborder.ie/site2015/wp-content/uploads/2016/06/CCBS-and-Cooperation-Ireland-EU-Referendum-Briefing-Paper-4.pdf>. The Department for Exiting the European Union's position paper on *Ireland and Northern Ireland*, cites figures from the 2011 Censuses for Northern Ireland and Ireland which estimate that 14,800 people regularly commute across the border for work and study. This figure does not include those who are self-employed or those who cross the border each day for more episodic or less regular business purposes: *Additional Data Paper: Common Travel Area and Statistics* (August 2017) para. 9, at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/638137/Additional_Data_Paper_-_Northern_Ireland_Common_Travel_Area.pdf [accessed 14 November 2017]. Data from 2015 puts the cross-border figure at 326,577 journeys per day: Derry City and Strabane District Council, Donegal County Council and Ulster University Economic Policy Centre, *Initial Analysis of the Challenges and Opportunities of Brexit for the North West City Region* (February 2017), p6, available at: <http://www.derrystrabane.com/getmedia/f1f1bbb6-e336-4acf-9fd9-5e1e171fe43f/Initial->

nationals. In 2014 the UK issued 17,000 new National Insurance Numbers to Irish nationals and the Republic of Ireland issued 15,000 new Personal Public Service Numbers to UK nationals.⁷⁶ For these individuals, the Brexit implications for freedom of movement and the exportability of social security benefits (including tax credits and child benefits) will need to be understood.

The employment history of cross-border workers evidences high mobility, with workers and those who are self-employed in a position to generate social insurance contributions in both jurisdictions. The current status of cross-border workers in the EU context means that they can aggregate their social insurance contributions to gain entitlement to contributions-based social security benefits and pensions, and export certain benefits. The basic rule for cross-border workers to determine entitlement to family benefits is that income is declared in the country of residence rather than the country of work. Two hugely complex tax systems, one in each of the jurisdictions, then collaborate to ensure that the right tax is paid so that the correct entitlement to tax credits and social security can be determined. Added in to the complexity of tax and social security systems is the complexity of individual lives. Entitlement to benefits or tax credits will be determined in relation to whether an individual is single or married; whether one parent works or both do; whether one/both parents work in the same/different jurisdictions; and whether any one of these factors varies over time. Regulation (EC) 883/2004 and the implementing Regulation (EC) 987/2009, govern the co-ordination of social security systems to ensure that movement for the purposes of employment does not impact a citizen's entitlement to social security as s/he moves between member states,⁷⁷ but once again this is a complex framework for a complex regime.⁷⁸

The removal of this framework would generate greater uncertainty regarding entitlement and transportability of benefits and, in social security systems, uncertainty is often detrimental for claimants. The Joint Agreement between the EU negotiators and the UK government, approved by the EU Council, offers some clarity, but is itself built on much of the uncertainty around how EU migrants will be treated post-Brexit. The limitations here concern the requirement that EU citizens living in the UK must apply for "settled status" to allow them to access acquired EU rights, with an incomplete understanding at this point of how that status will be determined or retained.⁷⁹ Particular gaps emerge for non-economically active EU

[Analysis-of-the-Challenges-and-Opportunities-of-Brexit-for-the-North-West-City-Region-150217.pdf](#).

⁷⁶ PwC, *Brexit: The Implications for Irish Businesses* <http://www.pwc.ie/media-centre/assets/publications/2016-pwc-ireland-Brexit-booklet2.pdf>. See also N Harris, "Demagnetisation of social security and health care for migrants to the UK" (2016) *European Journal of Social Security* 130-163, citing DWP figures: "In 2013, 31 per cent of new NINOs were issued to other EU nationals, 32 per cent to persons from Asia and the Middle East and 24 per cent to African immigrants."

⁷⁷ Reg. (EC) 883/2004 does not apply to social assistance benefits

⁷⁸ See S Reynolds, "EU citizens living in the UK", in M Dougan, *The UK after Brexit: Legal and Policy Challenges* (2017, Cambridge: Intersentia) pp 196-198

⁷⁹ In particular, there is a lack of clarity over what documentation will be required to prove settled status, what the application process will look like, or how the removal of the CJEU's authority will impact on the retention of those rights, and it already seems clear that

citizens, and for the children of EU migrant workers, who remain absent from the document's consideration. Irish citizens, however, will not need to apply for settled status and the impact of the GFA has meant that individuals in Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland.⁸⁰ Social security co-ordination between the UK and the EU is specifically covered by paragraph 28 of the Joint Agreement, which provides that Regulations 883/2004 and 987/2009 will apply for Irish citizens and those EU citizens who secure "settled status" in the UK, and will include the right to aggregate periods of social security insurance. What remains to be established is "a mechanism ... to decide jointly on the incorporation of future amendments to those Regulations in the Withdrawal Agreement."⁸¹ While the future position of other EU nationals living, working and/or claiming benefits across the Irish border remains less certain, the clearest picture emerges for Irish nationals, currently working and/or receiving benefits in either Northern Ireland or Ireland.

There is a further particular issue that relates to access to cross-border services and the exportability of benefits, including tax credits, where individuals living in Northern Ireland export benefit payments to pay for services in the Republic of Ireland. There is a lack of clarity over current protections and inevitably, therefore, a lack of certainty over future protections post-Brexit. The issue is highlighted by a recent tribunal of Commissioners' decision in Northern Ireland, *NB v HMRC*.⁸² The appellant, NB, was a single parent who was in receipt of working tax credits. She lived in county Fermanagh, a border county in Northern Ireland. She chose a childcare provider with experience of dealing with her child's particular needs, which was located six miles from her home, with the last half mile of this journey over the border in County Cavan in the Republic of Ireland. NB used her child tax credits to pay her childcare provider. HMRC made a determination that this was not eligible childcare within the Working Tax Credit Regulations 2002 as the provider was located outside the UK.⁸³ Consequently it determined that she had been overpaid approximately £20,000 and removed her entitlement to tax credits.⁸⁴

NB argued that HMRC was restricting her freedom to receive services within the EU under article 56 TFEU and Directive 2006/123/EC, and that the decision to remove her entitlement to tax credits was therefore unlawful. HMRC argued that there was no restriction on NB's

removal of EU citizens on grounds of criminality goes further than existing protection for current EU citizens.

⁸⁰ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, para. 52

⁸¹ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, para. 30.

⁸² *NB v HMRC* (TC) NICom 47

⁸³ Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002 (SI 2005/2002), reg.14(2)

⁸⁴ HMRC did not seek recovery of the overpayment

rights under European law because, within the tax credits legislation, there was a scheme to authorise childcare providers outside the UK. The tribunal of Commissioners disagreed with HMRC, finding that the scheme HMRC was referring to was for authorising childcare provision on military bases abroad; that the knowledge of the scheme, even among HMRC staff, was almost non-existent with the result that it was not accessible or transparent; and that the legislative power to authorize childcare providers outside the UK was questionable meaning that it was not a valid scheme for this purpose. The decision that the appellant was not entitled to tax credits was therefore unlawful, and the Commissioners found that NB was not disentitled to tax credits solely on the basis that her childcare provider was located in the Republic of Ireland. HMRC is now appealing the decision to the Northern Ireland Court of Appeal.

What is significant about this case, however, is that NB's remedy is directly connected to the exercise of her Treaty rights under European law, accessing services over the Irish border. The co-ordination of social security benefits and the aggregation of social insurance contributions will not assist with this type of case. Nor is it clear that the solution of treating those citizens in Northern Ireland who identify as Irish would work: if NB was to be defined as an Irish national, as distinct from a British national who will cease to derive these rights from Treaty provisions, would HMRC be required to permit her to export her tax credits? Social security co-ordination can still be achieved through bilateral agreements between an EU member state and third countries but this also creates potential problems. As Reynolds notes:

"Member States willing to reach such an arrangement with the UK will still consider the effects of applicable Union principles, such as those arising from the CJEU's *Gottardo* judgment. Following this decision, an agreement under which, for example, Ireland recognises contributions made in the UK when individuals make a claim to its social security system, would have to be extended not just to Irish and British nationals but also to any EU citizens who have worked in the UK and come to Ireland, with potential financial and administrative difficulties for Ireland as a result."⁸⁵

Without legal clarity over how future co-ordination of social security systems will work, there will still be practical, everyday problems that arise for social security claimants living on or near the border, none of which are at the fore of government's Brexit thinking.

The EU's perspective

The European Commission's working paper on *Essential Principles on Citizens' Rights* provided an early statement of the EU's position. Fundamentally, the Commission has made clear that rights stemming from EU citizenship – including social security – should be transformed into directly enforceable vested rights under UK law for the life time of those who currently hold these rights:

⁸⁵ S Reynolds, "EU citizens living in the UK", in M Dougan, *The UK after Brexit: Legal and Policy Challenges* (2017, Cambridge: Intersentia) pp 198

“The Withdrawal Agreement should protect the rights of EU27 citizens, UK nationals and their family members who, at the date of entry into force of the Withdrawal Agreement, have enjoyed rights relating to free movement under Union law, as well as rights which are in the process of being obtained and the rights the enjoyment of which will intervene at a later date.”⁸⁶

It has also made clear that the Withdrawal Agreement should protect the rights of EU citizens, UK nationals & family members in relation to work and to social security, as set out in Regulations 883/2004 and 987/2009, including the right to the aggregation and exportability of benefits. While making it clear that these rights, and the derived rights of family members, should be protected for life, the Commission also stated that:

“For rights and obligations set out in Regulations 883/2004 and 987/2009 on the coordination of social security systems, a mechanism should be established to incorporate future amendments to those regulations in the Withdrawal Agreement.”⁸⁷

The EU has defined its position as being based on principles of reciprocity, symmetry and non-discrimination. The European Commission’s paper on guidelines for the EU27 on the Brexit implications for Northern Ireland and the Republic of Ireland also makes clear that “[t]he United Kingdom should ensure that no diminution of rights is caused by the United Kingdom’s departure from the European Union, including in the area of protection against forms of discrimination currently enshrined in Union law.”⁸⁸

The UK’s position paper on citizens’ rights was published in June 2017, and proposed a less generous approach to the retention of social security rights for EU nationals living in the UK. The EU Parliament Brexit Steering Group published a damning response to the UK’s paper, stating that the UK does not respect the principles of reciprocity, symmetry and non-discrimination, raising concerns that “the rights of EU citizens in the UK will be reduced to a level lower than third country nationals in the EU” and that requirements to continually prove

⁸⁶ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Working Paper on Essential Principles on Citizens’ Rights* (May 2017), p2, available at https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf, [accessed 14 November 2017]

⁸⁷ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Working Paper on Essential Principles on Citizens’ Rights* (May 2017), para. III (4), available at https://ec.europa.eu/commission/sites/beta-political/files/citizens-rights-essential-principles-draft-position-paper_en.pdf [accessed 14 November 2017]

⁸⁸ European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU, *Guiding principles transmitted to EU27 for the Dialogue on Ireland/Northern Ireland* (2017), p4, available at https://ec.europa.eu/commission/sites/beta-political/files/guiding-principles-dialogue-ei-ni_en.pdf [accessed 14 November 2017]

their settled status amounts to “nothing less than relegation to second class status.”⁸⁹ The UK’s paper does state, however, that it will not alter the Common Travel Area arrangements between the UK and Ireland, including “the rights of British and Irish citizens in each others’ countries rooted in the Ireland Act 1949”, a commitment now formalised in the Joint Agreement.⁹⁰ While other EU nationals will be required to apply for settled status to protect their entitlements, this obligation will not be imposed on Irish citizens residing in the UK. The EU paper on citizenship rights does not comment on the potential exemptions for Irish nationals, while the UK’s position paper on Northern Ireland and Ireland does not comment on EU citizenship rights, focusing only on the citizenship issues flowing from the GFA. The coming together all of these disparate parts – EU citizens’ rights, constitutional outworkings from the GFA, the mechanisms required to maintain an ‘invisible’ border, the co-ordination of different social security and tax systems – is where the lived reality will be for many social security claimants and cross-border workers in Northern Ireland, who edge closer to clarity but have yet to reach that final point.

A joint position?

The EU’s pre-requisite for moving through the Brexit negotiations was that sufficient progress would be made on the three priority areas identified by the EU from the outset. Having missed the first deadline to demonstrate progress, the UK was under pressure to ensure that an agreed position could be reached to allow the EU Council to confirm the completion of phase one and a move to phase two. A series of last minute negotiations between the UK and the EU – sharply focused on Ireland’s demands for progress on the ‘border question’ and almost derailed by objections from the DUP who saw agreement on this issue as a threat to Northern Ireland’s position within the UK – finally resulted in a joint report agreed by Prime Minister Theresa May and Commission President Jean-Claude Juncker,⁹¹ approved by the EU Council in December 2017.⁹²

On the question of the Irish border, the Joint Agreement underpins the shared aspiration to avoid a ‘hard’ border, which “commits the UK to regulatory alignment with those EU rules regarding the single market and the customs union that support not just north-south cooperation on the island of the Ireland, but also the “all-island economy” and the protection

⁸⁹ European Parliament Brexit Steering Group, *Position Paper sent to Michel Barnier on 06-07-2017* (2017), para.6

⁹⁰ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*, para.54

⁹¹ TF50 (2017) 19 – Commission to EU 27, *Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union*

⁹² European Council (Art.50), 15/12/2017 and EU Council, *European Council (Art. 50) meeting (15 December 2017) – Guidelines*, Brussels, 15 December 2017.

of the 1998 Good Friday Agreement.”⁹³ What remains to be determined, however, is the legal (or political) process by which this regulatory alignment can be achieved, and how the constructive ambiguity of the Joint Agreement will simultaneously enable the UK to avoid a hard border with Ireland – north-south or east-west – if the UK fulfils its stated aim of leaving the single market and the customs union. Both the strength and the weakness of the Joint Agreement’s constructive ambiguity means that it is capable of being read differently by different political actors. The Irish government has been clear that the Joint Agreement provides for the north-south harmonisation required to avoid a hard border.⁹⁴ The Democratic Unionist Party has been publicly reassured that the Joint Agreement does not result in any constitutional divergence between Northern Ireland and Great Britain that would see an east-west border arise. The UK government position straddles the middle ground, simultaneously agreeing with both positions while rejecting the notion that it will have to continue to align with Ireland and therefore, in effect, the EU, in order to satisfy both the Joint and Good Friday Agreements. In recognising the uncertainty that will ensue from its interpretation, the Joint Agreement also makes the border question a specific focus for phase two of the negotiations:

“Given the specific nature of issues related to Ireland and Northern Ireland, and on the basis of the principles and commitments set out above, both Parties agree that in the next phase work will continue in a distinct strand of the negotiations on the detailed arrangements required to give them effect.”⁹⁵

The GFA provides strong precedent on how ‘constructive ambiguity’ can be highly effective, but it also evidences the need for political co-operation and strong leadership to make best use of such ambiguity. As Hayward and Phinnemore argue, “[e]stablishing the post-Brexit arrangements for the island of Ireland will be a process of negotiation. This process is entirely dependent not on technical solutions but on political will.”⁹⁶

The voice of Northern Ireland in determining the shape of the Joint Agreement has been claimed publicly by the DUP MPs at Westminster. Other (dissenting) voices from Northern Ireland have not had (or taken up) the same platform,⁹⁷ and the absence of a devolved

⁹³ D Phinnemore, <https://theconversation.com/brexit-deal-breaks-deadlock-experts-react-88879>

⁹⁴ *Irish Times*, “Brexit breakthrough: Taoiseach says ‘politically bullet-proof’ deal rules out hard border” 8 December 2017

⁹⁵ Para. 56 Joint Report

⁹⁶ K Hayward and D Phinnemore, “This Brexit juncture is a critical moment for the Belfast (Good Friday) Agreement” 27 November 2017, available at <http://qpol.qub.ac.uk/brexit-juncture-critical-moment-for-good-friday-agreement/> [accessed 18 December 2017]. See further D Phinnemore and K Hayward, *UK Withdrawal (‘Brexit’) and the Good Friday Agreement*, Policy Department for Citizens’ Rights and Constitutional Affairs, available at <http://www.qub.ac.uk/brexit/Brexitfilestore/Filetoupload,783331,en.pdf> [accessed 18 December 2017].

⁹⁷ An Ipsos MORI poll conducted in Northern Ireland in September 2017 indicated that the majority of respondents would be content with a to live with east-west border controls post-Brexit: “Unionist supporters content with East West post #Brexit border controls”,

Executive is now a clear weakness in determining Northern Ireland's constitutional future and its relationship with the EU. Within this morass of issues, the devolution of social security – already patterned by parity with Britain – and its impact on EU fundamental and Treaty rights for EU citizens in Northern Ireland currently exists as a legal fallacy. Given the absence of political co-operation on an inter-governmental level there are considerable concerns over the level of co-operation that can be achieved with the EU that will, as a consequence, protect the rights of social security claimants in Northern Ireland.

The future?

The impact of Brexit on UK social security law is unlikely to generate headlines, or indeed to be well understood: shifts in entitlement are more likely to be the unintended, unforeseen product of obscure, technical amendments that fall so far under the legislative radar as to be invisible to all but those who are directly affected. There is no reassurance at this point that the legislative detail will be scrutinised adequately to identify and manage the multiple consequential changes that will flow from Brexit, and much concern over a lack of knowledge or a lack of accountability determining the complex arrangements that govern social security. It may be possible to mount successful arguments to maintain some of the principles on which UK social security law has been developed, such as equal treatment and sex discrimination, but the prospects of retaining a principle of free movement look slim. National UK concerns about the absence of a migrant work-force will likely be oblivious to any consideration of whether non-UK nationals can access social security entitlements: social security will not be seen as a cure for absent migrant labour, even when it was defined as the problem that brought migrant workers to Britain.⁹⁸

For Northern Ireland, the migrant labour force has a particular profile which includes cross-border workers. The reciprocity of this arrangement extends to those Northern Ireland citizens seeking to work or access services in the Republic of Ireland. The role of fundamental rights in Northern Ireland, both in relation to EU law and core human rights principles under the ECHR, has been a critical feature of the constitutional and political arrangements that have sustained the peace, if not the political stability, in Northern Ireland. Along with the UK government, the Republic of Ireland has a role as guarantor of the Good Friday Agreement that further underlines the need to agree a Brexit that does not damage economic, social or political stability in Northern Ireland, or the underpinning rights. The EU is Ireland's firm ally in this regard, but the potential for protecting rights is diminishing. Any hope that the EU Charter on Fundamental Rights would be maintained vanished when the government achieved a majority vote on clause 5 in the EU (Withdrawal) Bill to remove the Charter from UK law post-Brexit. Other optimistic proposals to use Brexit as an opportunity to implement an enforceable Bill of Rights for Northern Ireland would help to bolster the protections for social security claimants in Northern Ireland,⁹⁹ but on their own will not be enough to plug the gap left by EU law, a gap that will be too far below the surface to be visible enough to

available at <https://sluggerotoole.com/2017/11/26/exclusive-poll-unionist-supporters-content-with-east-west-post-brexit-border-controls/> [accessed 18 December 2017]

⁹⁸ See for example Scheherazade Daneshkhu, "Migrant labour shortage leaves fruit rotting on UK farms" *The Financial Times* 3/11/2017

⁹⁹ BrexitLawNI, *Preliminary Findings Report – Brexit, Human Rights and Equality Issues* (2017)

become retained law. Enhanced scrutiny that provides the possibility of looking beneath the surface would lend some reassurance that the current corpus of EU law would be fully transposed, including the detailed provisions that provide reciprocal access to cross-border employment, benefits and services. And operational guarantees that current UK and Irish citizens will retain the same rights post-Brexit as they hold now would at least assist in the present, if not the future.

The ‘border question’ that was set as a priority by the EU has not been treated as such by the UK government. Agreement on progress on this pernicious question constitutes one of the biggest political obstacles that could derail the Brexit negotiations, yet in November 2017 – less than a month before progress was to be agreed with the EU Council – the House of Commons Public Accounts Committee was told that the UK Civil Service Border Planning Group had done no work on the border in Ireland.¹⁰⁰ It is unsurprising, therefore, that the UK’s position on cross-border social security rights remains unclear. The final deal, however, will be of critical importance to people living in Northern Ireland, or the Republic of Ireland, who are impacted directly by the practical outworking of the UK’s Brexit deal. These citizens – Irish, British and other EU migrants – will need to know whether they will be able to hold on to their existing rights (never mind take advantage of any future progressive change); whether the mechanism to replicate a workable social security co-ordination system will enable the exportability and aggregation of such rights in the future; and whether social security rules will corral them to only work or access services within the UK to maintain their social security entitlements. Judging by HMRC’s decision to appeal *NB*, the future protection of social security rights looks, at best, uncertain and, at worst, detrimental to the reality of life for cross-border citizens who face a removal of the existing legal framework of EU rights that will impact on fundamental decisions affecting work, financial security, children and family life.

¹⁰⁰ Public Accounts Committee, *Brexit and the borders: oral evidence 20 November 2017*, HC 668, Q.118